Supreme Court of the United States

OCTOBER TERM, 1919.

No. [redacted]54

ANA MARIA SUGAR CO., Inc.,

Petitioner,

against

TOMAS QUINONES,

Respondent.

BRIEF FOR PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

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INDEX

Table of Citations

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This Court on October 31, 1918 (248 U. S., 555), granted a writ of certiorari to the Judges of the United States Circuit Court of Appeals for the First Circuit (Rec., p. 113) to which return was duly made on November 20, 1918 (Rec., pp. 113-114).

The action was originally brought by Tomas Quinones as plaintiff against the Ana Maria Sugar Co., Inc., as defendant, in the District Court of Mayaguez, in Porto Rico (Rec., p. 1) and came on for trial before Mr. Justice FOOTE (Rec., p. 14), who sat without a jury. After hearing considerable testimony (Rec., pp. 14-74) he rendered judgment in favor of the defendant, Ana Maria Sugar Co., Inc., the petitioner herein, dismissing the complaint (Rec., pp. 9-10, 13). The learned Trial Judge made fourteen detailed findings of fact (Rec., pp. 10-12) and five conclusions of law (Rec., p. 12). Quinones then took an appeal to the Supreme Court of Porto Rico (Rec., p. 13) which reversed the judgment and rendered a lengthy opinion (Rec., pp 86-93) which referred to certain findings of the District Judge

and stated that it was unable to agree with such findings (Rec., p. 89). The Supreme Court of Porto Rico made no new findings of its own nor did it specifically reverse any of the findings of the District Judge nor state what findings of the District Judge it approved. The Supreme Court of Porto Rico not only reversed the dismissal of the complaint by the District Judge but awarded judgment for the plaintiff Quinones in the full amount claimed $6,173.24 (Rec., p. 93).

Ana Maria Sugar Co., Inc., the defendant in the court below, then made application to appeal to the United States Circuit Court of Appeals, First Circuit (Rec., p. 94) and filed fifteen assignments of error (Rec., pp. 95-96) and gave a bond (Rec., pp. 96-97). In the United States Circuit Court of Appeals the judgment of the Supreme Court of Porto Rico was affirmed (Rec., p. 109), the opinion of the Court being written by Judge BINGHAM (Rec., pp. 103-108). This opinion did not pass upon the merits of the contention of your petitioner, Ana Maria Sugar Co., Inc., nor consider the main questions presented upon the appeal:

> (1) Whether if a contract for the sale of the sugar were made it was not as found by the District Judge that as the sugar had been pledged to the Royal Bank of Canada the sugar was to be delivered only if the plaintiff should deposit with the Royal Bank of Canada its purchase price, and release the lien of the bank.
>
> (2) Whether the minds of the parties ever met in a valid contract.
>
> (3) Whether if the contract was made as alleged by the plaintiff an erroneous measure of damages was not adopted.

The learned Circuit Court of Appeals decided the case purely on a question of practice, holding that the appeal was improper but that it would consider the case as if a

writ of error had been obtained. It was held upon the writ of error that as your petitioner, Ana Maria Sugar Co., Inc., had presented no bill of exceptions, neither questions of fact nor the merits of the case could be reviewed, and the only questions open were whether the complaint stated a cause of action; whether the facts as found by the Supreme Court of Porto Rico supported the judgment rendered (Rec., p. 107) and whether there were any errors appearing on the face of the record proper. Upon this limited review the judgment of the Supreme Court of Porto Rico was affirmed.

In its application for a writ of certiorari to this Court your petitioner urged that all findings of fact in the trial court had been in its favor; that the Supreme Court of Porto Rico in reversing the judgment had made no new findings, and that it was not proper to require a bill of exceptions to be taken to the action of that Appellate Court and that the affirmance by the Circuit Court of Appeals should not prevent the merits of the action from being reviewed by this Court. The decision of this Court in granting the writ of certiorari (218 U. S., 555), evidently has adjudicated that the merits of this case can and should be reviewed.

The assignments of error.

The assignments of error which are urged before this Court by the petitioner are those that were presented to the United States Circuit Court of Appeals but which that Court refused to consider on account of the question of practice already referred to.

Upon the question what was the contract between the parties for the sale of sugar alleged to have taken place at Mayaguez, Porto Rico, on August 4, 1914, if any binding contract existed, the following assignments of error to the action of the Supreme Court of Porto Rico are important:

> "III. That the said Court erred in holding and deciding that the condition that the plaintiff was

to deposit the price or value of the sugar alleged to have been sold, subject to the order and for the account of defendant, as a condition precedent to the delivery of said sugar, was not embodied in the contract made by the parties, nor agreed to by plaintiff.

IV. The said Court erred in holding and deciding that said sugar was to be paid for upon its delivery and not prior thereto.

VI. That said Court further erred in reviewing the evidence in this case and overruling and reversing the finding of facts made by the trial court upon the condition precedent for the payment of said sugar.

VII. That the said Court erred in failing to consider and give due weight to the fact, proved in the record, that upon closing the said alleged contract, the defendant herein, by notice in writing, placed the said sugar at the disposal of plaintiff.

IX. That said Court erred in failing to consider and give weight and effect to the fact, as proved in the record, that plaintiff made no tender of the price of said sugar to the defendant, and that said sugar was pledged to the Royal Bank of Canada.

XIV. That the said Court erred in holding and deciding in effect that the defendant, the Ana Maria Sugar Company, broke its said pretended contract with the plaintiff above named" (Rec., pp. 95-96).

On the question of damages, the following assignments of error are important:

"X. That said Court also erred in holding and deciding that plaintiff herein was entitled to damages by way of compensation.

XI. That said Court erred in holding and deciding that the profits arising out of the rise of the price of the sugar in the New York market was con-

templated by the parties at the time of the making of the said alleged contract.

XII. That the said Court erred in allowing compensation to the plaintiff based upon the difference between the contract price and the price of the said sugar in the New York market at the end of the term alleged to have been contracted for its delivery" (Rec., p. 95).

The importance of these assignments of error will appear more in detail after the consideration of the facts found by the Trial Judge, which have never been specifically reversed by any court, and the testimony upon which they were based, as well as by the argument on the points of law following the consideration of the facts.

The Facts.

Inasmuch as the writ of certiorari here brings up the whole case for examination (*Camp* v. *Gress*, 250 U. S., 308, 318; *Latcher & Moore Lumber Co.* v. *Knight*, 217 U. S., 257, 267; *Delk* v. *St. Louis & San Francisco R. R. Co.*, 220 U. S., 580, 588), the facts will be considered under subdivisions.

(a) The Pleadings.

The amended complaint alleged that on August 4, 1914, in the City of Mayaguez, Porto Rico, the plaintiff bought from the defendant 740 sacks of centrifugal sugar, second class, at the rate of $3.22½ per hundred weight, "according to the custom of this market, cash value at the moment of delivery," and that this sugar should be delivered to the plaintiff in lots or partial cargoes by the end of the week subsequent to the date of the contract, to wit, the 15th day of August, 1914 (Rec., p. 2). It was then

alleged that the defendant, departing from the agreement by letter received by the plaintiff on August 5, 1914, required that he should make previous deposit of the total amount of the invoice for the sugar sold ($6,979), and that this the plaintiff refused to accept, whereupon on August 6, 1914, the defendant corporation informed the plaintiff that the contract had been cancelled and did not make any deliveries of sugar, although the plaintiff was willing to pay the price agreed, and complied, on his part, with all the stipulations of the contract (Rec., p. 2). It was then alleged that on August 10, 1914, the plaintiff in good faith offered to make a deposit of the $6,979, the price of the sugar, and that the defendant refused to make delivery of the sugar sold (Rec., p. 2).

A far different transaction was set up in the amended answer which alleged:

> "I. That on or about August 4, 1914, in the city of Mayaguez, Porto Rico, plaintiff and defendant entered into or had certain negotiations as to a sale by the latter to the former of 748 sacks of cane sugar, which was to be carried out in the following terms: Plaintiff was to make a previous deposit on that very day in the Royal Bank of Canada, at Mayaguez, Porto Rico, and in favor of the defendant, of the amount of the purchase price of said sugar, to wit, the sum of $6,979, and once the deposit was made the defendant was to deliver the said sugar to the plaintiff in partial lots of 160 sacks, the first by railroad, upon receipt of the order of the Bank to that effect, and the remainder by cart loads during the week next to the aforesaid date.
>
> II. That the stipulation as to the previous deposit of the value for said sugar in the said Bank had to be, and was, a condition previous and precedent to the obligation of making the delivery of the sugar by the defendant to the plaintiff, which was imposed and accepted by the defendant, inasmuch as the said sugar was subject to a contract of loan of the same with said Royal Bank of Canada,

in Mayaguez, according to which contract the defendant could not dispose, in any manner, of said sugar without first making a deposit of the value thereof, and obtaining the proper authorization by said Bank, all of which was known to plaintiff at the time of the said negotiations" (Rec., pp. 6, 7).

(b) The Pledge of the Sugar.

The District Judge found:

> "IV. That the said sugar was, upon the execution of the contract, pledged by the defendant to the aforesaid Bank by virtue of a private document, signed before a notary, under date prior to the execution of said contract of sale, and that defendant could not dispose of said article without previously paying its value or amount to the Bank" (Rec., p. 11).

This finding was not referred to in the opinion of the Supreme Court of Porto Rico and was not reversed and was amply supported by the testimony.

The agreement of pledge was introduced in evidence as Defendant's Exhibit 1 (Rec., p. 49), but this being inaccurate as to date and in other respects the corrected exhibit was later inserted in the record by consent and called Exhibit 1a (Rec., pp. 84, 85). From these exhibits it appeared that the defendant Sugar Company had obtained on May 23, 1914, a loan of $5,800 from the Bank, and had pledged 968 bags of sugar, 720 bags being at the Central Ana Maria, and 248 at Pagan's Warehouse (Rec., pp. 48, 85).

Mr. Hiltz, the Manager of the Bank (Rec., p. 62) and who was clearly an impartial witness and who testified that both the plaintiff and defendant company were his clients (Rec., pp. 51, 53), said that the pledge agreement covered the sugar involved in this suit (Rec., pp. 48, 50). He said:

> "This sugar was pledged to the Bank by Ana Maria Sugar Company, as shown by document mark-

ed 'Defendant's Exhibit 1'; Ana Maria Company could dispose of it after depositing the amount of the loan secured by such sugar."

"In this way we have always dealt with Ana Maria Sugar Company, so that, in accordance with the contract, if they want to sell or dispose of a part of the sugar pledged, a deposit was made in the Bank covering the proportional part which was to be disposed of, and the Bank then issue the order for delivery" (Rec., p. 50).

He further said that the Bank did not lend any money to the Ana Maria Sugar Company from the first to the tenth of August, 1914, and on that date the defendant had no sugar, as it was all pledged to the Bank (Rec., p. 53).

The testimony of Mr. Hiltz corroborates that of Mr. Alfonso Valdes, the President of the defendant (Rec., p. 59), that all the defendant's sugar was pledged (Rec., pp. 59, 64). Mr. Vals, the Treasurer of the defendant, also testified that on the 4th of August, 1914, all the sugar had been pledged to the Bank and that there was not any unpledged sugar (Rec., p. 66). Mr. Valdes said that in cases of pledged sugar the money was always deposited in the bank before the delivery of the sugar, and that this deposit was made on the same day or the following day (Rec., p. 64).

There was no testimony that the sugar was not pledged and the finding of the District Court (IV, Rec., p. 11) not referred to or reversed by the Supreme Court of Porto Rico, is therefore conclusive.

(c) Happenings of August 4, 1914.

Mr. Valdes testified that on August 4, 1914, in a telephone conversation with plaintiff, after discussion of price of sugar to be sold to the plaintiff and reaching an agreement of $3.22½ per hundred pounds, he told the plaintiff that 160 sacks had already been loaded on the wagon of

the American Railroad (Rec., p. 54), and the rest was in the warehouse of the defendant (Rec., p. 54). He further testified:

> "I told Mr. Quinones that as soon as I should receive the order from the Bank, from the Royal Bank of Canada, in regard to the delivery of the sugar, I would immediately send the wagon containing the 160 sacks, and I would start on the next week sending him the other sacks (those that were not on the wagons), in mule carts, in carts which we have at the Central, but that it was a necessary and indispensable requisite to deposit in the Royal Bank of Canada the sum, the amount—that is, the amount of the bill—the price of the sugar, to which Mr. Tomas Quinones agreed immediately" (Rec., p. 54).

The office of the Central was about eight or nine kilometers from Mayaguez (Rec., p. 56), but this would not be too great a distance for carting, which would save railroad freight, as the defendant owned the carts (Rec., p. 58). The proposal to deliver in this way was made by Mr. Valdes so as not to overwork his oxen (Rec., p. 58); but this was a convenience also to the plaintiff, who would not need so many workmen at the playa when the sugar came in (Rec., p. 58).

Mr. Valdes was positive that he told the plaintiff that the sugar was pledged, and that it was necessary for the plaintiff to deposit the money in the Bank in order to obtain the order of delivery (Rec., p. 59).

Mr. Vals, the Treasurer of the defendant, fully corroborated Mr. Valdes, as he was sitting near the telephone at the time of the conversation, and heard Mr. Valdes say that the person to whom he was talking should deposit the price of the sugar in the Royal Bank of Canada (Rec., p. 66).

In considering the testimony of the plaintiff, it is important to remember that Mr. Valdes said that the plain-

tiff on being told that the money had to be paid to the Bank merely said "All right," or words to that effect (Rec., p. 59).

Acordingly, the testimony of plaintiff's assistant, Mr. Monefeldt, that he heard the plaintiff speaking over the telephone, and that he heard talk of the price of the sugar and the date of delivery, but nothing about paying for it in advance (Rec., p. 72), but that he could not hear what was said at the defendant's end of the line (Rec., p. 73), is perfectly consistent with the testimony of the defendant, so that the testimony of the plaintiff that nothing was said as to the sugar being pledged (Rec., p. 29) is wholly unsupported.

On cross-examination the plaintiff made two very important admissions which strongly corroborated the testimony of the defendant, saying:

> "I asked Mr. Valdes—I had forgotten this detail—'Is the sugar yours or of the Bank?' and he answered: 'The sugar is mine'" (Rec., p. 31; see also p. 32).

As the sugar was pledged, Mr. Valdes, as matter of course, would mention the fact. If he did not say this, it is improbable that the plaintiff should have talked about the Bank at all or have inquired whether the Bank had the sugar.

It appears that immediately after the telephone conversation that afternoon, both plaintiff and Mr. Valdes wrote letters of alleged confirmation of the transaction. Mr. Vals, the Treasurer of the Bank, who had heard the conversation of Mr. Valdes, wrote out the letter at Mr. Valdes' request, and having heard the condition as to the Bank, put it in the letter (Plaintiff's Exhibit C, p. 19), which he prepared (Rec., p. 66), and which Mr. Valdes stated was dictated to Mr. Vals immediately after the telephone talk (Rec., p. 56). This letter reads as follows:

"(C) Mayaguez, August 4th, 1914.

Mr. Thomas Quinones, Mayaguez.

Dear Sir and friend:

We hereby ratify the sale we have made you of 748 sacks of sugar, second kind, weighing 252 pounds each sack, at price of $3.22.5 per 100 weight, which sugar is at your disposal at this Central, to be delivered to you during next week, and a wagon, with 160 sacks, which shall be dispatched as soon as we get the order from the Royal Bank of Canada, of this city. We also beg to enclose the corresponding invoice for the 748 sacks, which are valued at $6,079, which sum must be deposited by you at The Royal Bank of Canada, aforesaid, to our account, to be able to make the delivery as agreed.

Yours truly,
(Signed) Ana Maria Sugar Co., Inc.,
A. Valdes, President" (Rec. p. 19).

The invoice (Exhibit D) which accompanied the letter showed that the total price was $6,079, number of sacks 748, total weight 188,496 pounds, and the price $3.22½ per 100 weight (Rec. p. 19).

It is significant that the plaintiff on August 5, 1914, the next day, admitted that the invoice was correct and that the defendant's letter was also correct (Rec. pp. 19-20), with the exception of the provision about the deposit with the Royal Bank of Canada (Rec., p. 20). This admission shows that the letter written by the plaintiff through Monefeldt placing the number of sacks at 740 and that the deliveries to be made "during all next week" (Exhibit B, pp. 18-19), was not accurate. Moreover, Exhibit B, the plaintiff's letter of confirmation, said nothing about when or how payment for the sugar should be made, and is not inconsistent with what the defendant said as to prepayment being required by the Royal Bank of Canada in order to release the pledge.

It is undisputed that on the afternoon of the fourth of August, 1914, Mr. Valdes started for San Juan (Rec., pp. 54, 66), where he remained until the 7th of August (Rec., p. 55), as he was accustomed to stay with his family once every two weeks during the grinding season, and once a week at other times (Rec., p. 63).

It is thus seen that the District Judge was fully justified in making the following finding:

> "II. That on or about August 4, 1914, plaintiff and defendant entered into a contract by telephone, by virtue of which the latter sold to the former 748 sacks of centrifugal sugar, second class, each sack weighing 252 pounds, at the price of $3.22½ per hundred weight, the said sugar being immediately placed at the disposal of the plaintiff, at the storehouse of the factory, situated in the ward of Sabanetas, of the Municipality of Mayaguez, to be delivered by the defendant to the plaintiff in the following manner: One hundred and sixty sacks by railroad as soon as defendant received the order for delivery from the Royal Bank of Canada, Mayaguez branch, and the remainder during the week next to that of the date of the execution of this contract, and in cart-loads; it being agreed likewise by both parties that the value of said sugar—that is, the sum of six thousand and seventy-nine dollars ($6,079)—should be previously deposited by plaintiff in said Bank, and at the disposal of the defendant, so that the latter could make the delivery of the sugar so sold" (Rec., pp. 10-11).

This finding was not specifically reversed by the Supreme Court of Porto Rico and was not at all considered by the United States Circuit Court of Appeals (Rec., pp. 103-108).

(d) Failure of the Plaintiff to pay for the sugar at the Bank.

On August 5, 1914, after receiving this letter of confirmation (Exhibit C), the plaintiff replied acknowledg-

ing receipt of that letter and of the bill for the sugar bought and stated:

> "I agree with all, except with the duty which you impose on me of paying for the article before receiving same" (Exhibit E, Rec., p. 20).

On the 5th of August, Mr. Vals, Treasurer of the defendant, went to the Royal Bank and told Mr. Hiltz, the Manager, about the transaction, and that the plaintiff had to deposit the price of the sugar at the Bank (Hiltz, Rec., p. 50). Mr. Vals testified that having been asked by Mr. Valdes before he went to San Juan, on the evening of the 4th, to be on the lookout for the deposit of the money at the Bank, he stopped on the morning of the 5th at the Bank on his way from Mayaguez to the Central (Rec., p. 66), and then told Mr. Hiltz of the arrangement, and asked to be notified if the deposit were made so that he could proceed with the delivery of the sugar (Rec., p. 66).

There is some question in the testimony whether it was on the fifth or the sixth of August that Mr. Hiltz, Manager of the Bank, communicated with the plaintiff as to the necessity for releasing the pledge of the sugar by payment at the Bank; but all the witnesses agree, even the plaintiff, that on one of these days Mr. Hiltz did telephone to the plaintiff and asked the plaintiff to deposit the money.

Mr. Hiltz first said that this telephone conversation was between 1:30 and 2:30 P. M. on the sixth, and that the plaintiff called in at the Bank that afternoon (Rec., p. 50), and that the plaintiff then inquired why he should have to deposit the money in the Bank as that was not the custom among merchants, whereupon Hiltz replied that he could do nothing; that he had orders from Mr. Valdes to that affect, and if the money was not deposited at three o'clock that day he could not give an order for the delivery of the sugar (Rec., p. 50).

On September 10th, Mr. Hiltz wrote the plaintiff a letter (Exhibit T—found improperly translated, Rec., pp. 52, 53, and correctly translated, Rec., p. 83), in which he confirmed the telephone conversation that the plaintiff had had with him on the afternoon of August 5th,

> "in which we advised you, having received from the Ana Maria Sugar Company instructions to receive from you, for their account, if presented on that day, the sum of $6,079 (six thousand and seventy-nine dollars)" (Rec., p. 83).

The plaintiff testified that he had in the Bank during all this time a current account which never went below $25,000, and also a special deposit of $11,000, on which it would be necessary to give two weeks' notice before withdrawing (Rec., p. 74), so that there was apparently no reason why the plaintiff should not have immediately drawn his check on the Bank for the price of the sugar, released it from the pledge, and obtained an order for its delivery.

The record shows that the price of sugar in New York on the 4th and 5th of August was $3.525, on the 5th and 6th averaged $4.14 per 100 weight, the Porto Rican price being twenty cents less (Rec., p. 37), so that the plaintiff by paying but $3.22½ on the 5th of August would have made a material profit on the sugar if he had taken it at that time, and the plaintiff in this transaction was admittedly a speculator (Rec., p. 16).

The plaintiff admitted that he had had an opportunity to make the deposit on August 5th (Rec., p. 31), but claimed that he felt disgusted on receiving the defendant's letter of August 4th, and that that letter did not express the true agreement (Rec., p. 30). He admitted that he went to the Bank and spoke to Mr. Hiltz on the 5th when sugar was up (Rec., p. 31), and claimed that he called up the defendant and tried to speak to Mr. Valdes to see if some mistake had not been made (Rec., p. 31).

He also admits that he spoke to Mr. Vals on the phone. He said:

> "'Tell me, Vals, will you explain me this: I received a letter in this sense, and now the Royal informs me that if I do not give that money now they will not receive it tomorrow.' He says: 'Don Tomas, I do not know anything of that; this is a matter of Mr. Valdes; the only thing I know is that the Bank has informed me not to deliver the sugar'" (Rec., p. 31).

A strong circumstance which wholly discredited the plaintiff was his assertion that he made no inquiries of the Bank about the sugar having been pledged (Rec., p. 31), although he knew from Mr. Hiltz, the manager, and from Exhibit C (Rec., pp. 19, 31), that the money was to be paid in to the Bank, which, of course, must have conveyed to him that the sugar had been pledged at the Bank. Under these circumstances the following finding of the District Judge seems amply supported by the evidence:

> "IX. That plaintiff made no offer to defendant as to the satisfaction of the value of said sugar as agreed in said contract, nor did he offer to make a deposit, nor did he deposit the said value for the sugar while the aforesaid contract was continued in force by the defendant" (Rec., p. 11).

(e) Cancellation of the Contract.

Mr. Vals testified that pursuant to his instruction from Mr. Valdes before he left for San Juan and by telephone from Mr. Valdes on the 6th of August, and after being informed by Mr. Hiltz that the banking day had closed that afternoon, and that plaintiff had not deposited the money either on the 5th or 6th, he wrote, Exhibit F (Rec., p. 20), cancelling the operation (Rec., p. 66). This letter stated:

"(F) Mayaguez, August 6th, 1914.

Mr. Tomas Quinones, Mayaguez.

Dear Sir and Friend: Having been informed from the Royal Bank of Canada, of this city, that you have not delivered for our account the price of the sugar sold to you according to our letter of the 4th instant, without said requirement we cannot make the deliver of said sugar, under the conditions of our letter, we beg to inform you we have cancelled the transaction of sale, and therefore beg to ask you to return to us the invoice remitted covering the purchase. We regret this incident which prevents us from carrying into effect the transaction made between you and our President, and we remain,

Your friends,

(Signed) ANA MARIA SUGAR CO., INC.,

Per VALS, Treasurer" (Rec., p. 20).

Mr. Valdes testified to having telephoned from San Juan and that he also telephoned the Bank that day (Rec., pp. 54, 55, 60, 61). He said that he had waited three days for the plaintiff to deposit the money and he thought his offer should not be open indefinitely (Rec., p. 57).

At that time sugar was $4.14 at New York or $3.94 at Porto Rico,—$.71½ more than the contract price per hundred pounds or $1,337.96 more expensive on the entire amount.

On the 7th of August, 1914, plaintiff wrote a long letter (Exhibit G, Rec., p. 21), in which he claimed delivery was to be in what he termed "the ordinary manner," but that he would be willing to pay for the sugar when delivered, even if it were all delivered at once. The letter carefully refrains from referring to the sugar having been pledged, although the plaintiff then knew that this was the condition (Rec., p. 31). The District Court

found that the defendant rightly rescinded the contract for plaintiff's failure to pay the money to the bank, saying:

> "VIII. That defendant on August 6, 1914, informed the plaintiff, by letter sent to him on said date, that the above contract was terminated and rescinded, which was confirmed by letter of the 7th of the same month, the defendant having taken this resolution, inasmuch as plaintiff did not comply with the condition stipulated with regard to the payment" (Rec., p. 11).

(f) The belated deposit at the Bank.

The strongest admission on the part of the plaintiff that the defendant's letter of August 4th (Exhibit C), expressed the correct agreement between the parties was a belated attempt on August 10, 1914, on the part of the plaintiff to deposit the $6,07$ at the Bank, with a demand for delivery during that week (Exhibit K, Rec., p. 23). August 10, 1914, was Monday, when the average price of sugar was $4.97 at New York (Rec., p. 37), and allowing for the twenty cents difference at Porto Rico (Rec., p. 36), the Porto Rican price was $4.77. This made the difference between the contract price and the market that day, $1.34½ per 100 weight, which, for the 188,196 pounds, aggregated $2,555.27. The contract having been cancelled, the Bank refused to accept the check (Exhibit P, Rec., p. 33), the Bank's letter being admitted in evidence as Exhibit Q (Rec., p. 34).

The District Court found:

> "X. That on August 10 of the said year, 1914, and after plaintiff had notified the defendant of his repudiation of the manner of making the payment, and made a different proposition as to the manner of delivery of the article contracted for, it was that the said plaintiff attempted to deposit in the Royal Bank of Canada, Mayaguez branch, the price of said

sugar in the sum agreed and by means of a check" (Rec., p. 11).

No demand was made by the plaintiff for the sugar after this.

(g) The rise in price and the subsequent sale of the sugar.

Mr. Bravo testified as to the values of sugar in New York, and that during the week beginning Monday, August 10th, the price of sugar in New York constantly rose from $4.92 to $6.52 (Rec., p. 37) on the 14th, which was Friday; and on Monday, the 17th, and Tuesday, the 18th, it was at the same price. Then it gradually dropped, with fluctuations, but still remained at $6.02 on the 31st day of August, 1914. The average for the entire month was $5.477 (Rec., p. 37). The Sugar Sales Corporation quotations were substantially the same, the average for the month at Porto Rico being the same figures less the 20 cents. The average at Porto Rico for the first half of August, 1914, was given at $4.807, and for the second half of August, 1914, at $6.085 (Rec., p. 46).

Mr. Valdes having testified that most of the defendant's company's sugar for 1914 sold at $6.52 (Rec., p. 45), although he had sold sugar to Mr. Grau at $3.35 (Rec., p. 45), the Supreme Court of Porto Rico used that testimony as a basis for holding the defendant responsible for the highest price of the month—$6.52.

(h) The Opinions and Findings of the Lower Courts.

The opinion of District Judge Foote after stating them detailed findings of fact already referred to (Rec., pp. 10, 11) made the following conclusions of law:

> "1. That plaintiff, Tomas Quinones, unduly violated and repudiated the contract he had with the

defendant in refusing to comply with the stipulation made as to the payment in the manner stipulated by his letter of August 5, 1914.

II. That the proposal made in said letter to the defendant that the date of the delivery of the goods should be changed, constituted a proposal to modify the said contract, which was never accepted by the defendant.

III. That the attempted offer as to the deposit of the money made by the plaintiff in the Royal Bank of Canada, on August 10, 1914, after the contract had been violated and repudiated by him, and had been broken and rescinded by the defendant, could not produce, nor did it produce, any legal effect.

IV. That the violation and repudiation of the contract by the plaintiff, in the manner stated, justified the cancellation and rescission made by the defendant.

V. That by virtue of the foregoing facts and conclusions, plaintiff is estopped from claiming or recovering anything from the defendant, and the complaint filed by the plaintiff should be dismissed, as it is hereby dismissed" (Rec., p. 12).

In the Supreme Court of Porto Rico, while Justice HUTCHISON said that the Court found itself "wholly unable to agree with the trial court in its findings as to the nature of the original contract" (Rec., p. 89), no new findings were made. The following expressions in the opinion are the only ones that could by any possibility be construed as being equivalent to findings.

"It will suffice to say that we are thoroughly convinced by the whole record that in the conversation by telephone, on the 4th of August, which constituted the true contract between the parties, nothing whatever was said about a deposit of money as a condition precedent to the delivery of the sugar.

> The conduct of plaintiff from the beginning to the end of the controversy is entirely consistent with his version of that conversation, is inexplicable upon any other theory, and is wholly inconsistent and irreconcilable with the version of defendant and the theory of the Trial Court. * * *
>
> * * * It may be that the representative of defendant intended to include the stipulation in the original agreement and believed that he had done so. It may be that he had no desire to avoid or repudiate his contract and that he acted in the utmost good faith throughout. But however this may be, we have no doubt whatsoever that the first notice plaintiff ever had of the proposed requirement as to deposit of the purchase price was contained in defendant's letter confirming the agreement by telephone and after the contract of purchase and sale had been consummated" (Rec., pp. 89, 90).

The opinion of the Supreme Court ignored the finding that the sugar was pledged; the finding of the District Court supported by the testimony of two witnesses that the plaintiff was told the sugar was pledged, and finally the admission of the plaintiff upon cross examination that he had asked Mr. Valdes, President of the Ana Maria Sugar Co., Inc., whether the sugar was owned by the defendant or the Bank. This question would have been wholly unnecessary unless some talk had preceded that as to the rights of the Bank. If nothing had been said about a pledge it never would have occurred to the plaintiff to mention the Bank at all. There was no motive for the defendant on August 4, 1914, when writing the letter of confirmation, to say anything about the pledge of the sugar and payment to the Bank unless this had been the agreement, for on that day the price agreed upon was the market value and there was no motive for the defendant not to carry out the contract; that all the sugar was pledged made it imperative that the contract be made in just the form stated by the defendant that it was made. The Supreme

Court of Porto Rico also ignored the fact that the plaintiff on August 5, 1914, had the opportunity when he went to the Bank to make the deposit and get the sugar and having testified that he had more than enough funds on deposit at the same Bank he could easily have made the payment on August 5th. The conclusion reached by the Supreme Court of Porto Rico that the defendant broke its contract and was liable in damages, is seen to rest on no proper foundation.

The Supreme Court of Porto Rico did not have the advantage of having heard the witnesses testify and observe their manner of testifying, as did the District Judge, and having ignored the principal fact which must have influenced the District Judge in passing upon the credibility of the various witnesses, namely the fact that the sugar was pledged, the Supreme Court violated the almost universal rule which forbids an appellate court from reversing upon the facts, unless the findings of the District Judge are found most clearly to be erroneous.

Upon the question of damages the Supreme Court went even further afield, where it said:

> "In the case at bar it seems that defendant actually sold during the month of August large quantities of sugar at $6.52, apparently including the lot already sold to plaintiff at $3.22½, it follows that whether the difference in price be regarded as damages or as the proceeds of a resulting trust, the profit thus actually obtained by the defendant on the sugar of the plaintiff, belongs to the latter and not to the former. We are not disposed, therefore, to scrutinize very closely the question of what may or may not constitute the most appropriate technical measure of the damages sustained" (Rec., pp. 92, 93).

This action was not brought in equity to impress a trust on any of the defendant's property, but was purely an action at law to recover damages for a breach of contract,

and it is wholly immaterial what the defendant afterwards obtained for the sugar; the plaintiff is only entitled to the damages which he sustained from the breach of the contract if any breach, in fact, occurred.

The Supreme Court of Porto Rico ignored the fact that under the contract 160 sacks of the sugar were to be delivered during the week ending August 8th when the highest price was $1.26, and that the rest of the sugar was deliverable by the defendant at any time during that or the following week, and that up to Wednesday, the 12th, the price of sugar was below six cents a pound. To give damages as it did to the plaintiff for the price on Saturday, August 15th, the last day of the second week and the last day when any deliveries could have been made when the price was $6.52 a hundred pounds, was to ignore the admitted provisions of the contract that the sugar was to be delivered in instalments and not on the last day of the second week (when the price was $6.52). None of the authorities cited in the opinion of the Supreme Court of Porto Rico support this extraordinary stand on the question of damages.

In the Circuit Court of Appeals ,although the correctness of the conclusion of the Supreme Court of Porto Rico was challenged by the fifteen assignments of error (Rec., pp. 95, 96), the Court held that errors in rulings of law in the Supreme Court of Porto Rico could not be reviewed because not embraced in any bill of exceptions from that Appellate Court (Rec., p. 107). Therefore the only questions open were (1) whether the complaint stated a good cause of action on breach of contract; (2) whether the Supreme Court of Porto Rico exceeded its jurisdiction in entering final judgment; and (3) whether the facts found by the Supreme Court support the judgment which it rendered (Rec., p. 107). The learned Circuit Judge writing the opinion, was in error in stating that any findings of fact were made by the Supreme Court of Porto Rico

unless the statements made by the Court in the opinion constitute such findings. Such statements in the opinion only covered a few of the points in the case. The detailed findings of fact and conclusions of law of the District Judge were not substantially reversed or set aside. The Circuit Court of Appeals then took up the questions which it admitted could be reviewed under the limited powers which it held it could exercise upon the writ of error and held the complaint was good; that the Court of Porto Rico had a right to enter an affirmative judgment and "(3) the facts found support the judgment. It is unnecessary to restate them. They sufficiently appear in what has been above set forth" (Rec., p. 108).

POINT I.

If any binding contract for the sale of the sugar was made on August 4th, 1914, an essential part of the contract was that the plaintiff was required in order to release the pledge to the Royal Bank of Canada, to pay the contract price to that bank before the sugar was delivered.

In determining whether if any contract was made on August 4th, 1914, what were its terms, it is important to consider the fourth finding made by the District Judge (Rec., p. 11) which was based upon uncontradicted testimony that the sugar the parties were talking about over the telephone as a matter of fact had been pledged to the Royal Bank of Canada by a private document, executed on May 23rd, 1914 (Rec., pp. 84, 85), almost three months before. Having this pledge in mind it was but most reasonable to expect the contract to refer to this pledge, for unless the claims of the Bank were satisfied no sugar could have

been delivered. The letter written by the defendant corporation to the plaintiff (Exhibit C, Rec., p. 19) refers to the prior pledge of the sugar to the Bank when it is stated:

"(C) Mayaguez, Augst 4th, 1914.

Mr. Tomas Quinones, Mayaguez.

Dear Sir and Friend: We hereby ratify the sale we have made you of 748 sacks of sugar, second kind, weighing 252 pounds each sack, at price of $3.225 per 100 weight, which sugar is at your disposal at this Central, to be delivered to you during next week, and a wagon, with 160 sacks, which shall be dispatched as soon as we get the order from the Royal Bank of Canada, of this city. We also beg to enclose the corresponding invoice for the 748 sacks, which are valued at $6,079, which sum must be deposited by you at The Royal Bank of Canada, aforesaid, to our account, to be able to make the delivery as agreed.

Yours truly,

(Signed) ANA MARIA SUGAR CO., Inc.,

A. VALDES, President."

The invoice accompanying this letter gave the exact weights of the sugar (Exhibit D, Rec., p. 19) which was evidently intended by the defendant as being a substitute for the ordinary custom of weighing the sugar and indicated clearly that at least the defendant's understanding of the contract was that this transaction was not the customary one, as testified by plaintiff's witnesses, of paying for the sugar after its being weighed, upon delivery. At the time this letter of August 4th was sent there is no evidence that the price mentioned was not the fair and market value of the sugar and there was no possible motive on the part of the defendant to attempt to avoid the contract. The cross-letter sent to the defendant by the plaintiff (Exhibit B, Rec., pp. 18, 19) was inaccurate as to the number of sacks, mentioning 740 instead of 748, which the plaintiff

subsequently agreed was the correct amount (Exhibit E, Rec., p. 20). There is nothing stated in plaintiff's letter of August 4th, 1914, that was contradictory of an understanding to release the pledge of the sugar with the Bank by paying the purchase price directly to the Bank, and in fact no reference was made as to when the payment was to be made. The oral evidence on the subject is positive on the part of the defendant and largely negative on the part of the plaintiff, Mr. Monefeldt merely stating that he did not hear anything said about payment to the Royal Bank of Canada, but this is perfectly consistent with other testimony that all such expressions were used by Mr. Valdes, representative of the defendant, and that Monefeldt only heard that side of the telephonic conversation that was conducted by Mr. Quinones, the plaintiff. The learned District Judge, who saw the witnesses and observed their manner of testifying, made the second finding of fact (Rec., pp. 10-11) that the sugar was to be delivered as soon as the defendant received the order for delivery from the Royal Bank of Canada, Mayaguez branch, and that it was agreed that the value of the sugar should be previously deposited by the plaintiff in that Bank.

It is well settled in the Federal Courts that an Appellate Court will not reverse the decision of a Judge sitting at the trial who heard the witnesses and observed their manner of testifying when there is a sharply disputed question of fact, unless it is apparent that clear error was made by the lower court in his decision.

Villanueva v. *Villanueva*, 239 U. S., 293;
Lacy v. *McCafferty*, 215 Fed., 352 (C. C. A. 8th);
Semidey v. *Central Aguirre Co.*, 239 Fed., 610 (C. C. A. 1st);
First National Bank v. *Eiseman*, 246 Fed., 597 (C. C. A. 5th);

Trujillo and Mercado v. *Succession of Rodriguez*, 233 Fed., 208 (C. C. A. 1st);
Brookheim v. *Greenbaum*, 225 Fed., 763 (C. C. A. 2nd).

In *Brookheim* v. *Greenbaum*, COXE, *J.*, said:

> "The judge had the witnesses before him and is much better able to judge of their credibility than a Court which sees only their statements on paper. We should not reverse this finding upon a pure question of fact where the evidence justifies the finding even if we might have reached a different conclusion upon the evidence. In *Coder* v. *Arts*, 152 Fed., 943, at p. 946, 82 C. C. A. 91, 15 L. R. A. (N. S.), 372, the Court says:
>
> > 'When the Court has considered conflicting evidence and made a finding or decree it is presumptively correct and unless some serious error of law has intervened or some serious mistake of fact has been made, the finding or decree must be permitted to stand.'"

In *Semidey* v. *Central Aguirre Co.*, ALDRICH, District Judge, writing the opinion of the Court, said at pages 614 and 615:

> "While in an equity proceeding the court of review may and must examine the case *de novo* findings of fact by the court, who saw the witnesses and was in close touch with the locality and the physical conditions involved, will not be disturbed, except in case of clear and unmistakable error. *Villanueva* v. *Villanueva*, 239 U. S., 293; *Washington Securities Co.* v. *U. S.*, 234 U. S., 76, 78, *Stuart* v. *Hayden*, 169 U. S., 1, 14; *Trujillo and Mercado* v. *Succession of Rodriguez*, 233 Fed., 208, 147 C. C. A. 214."

Numerous decisions of the Supreme Court of Porto Rico heretofore laid down the rule we now assert but ap-

parently these cases were ignored by the Supreme Court in the case at bar.

Quevedo v. *Pino*, 15 P. R., 675-677, citing numerous cases;
Rico v. *Lopez*, 21 P. R., 201, 207.

While the Courts have stated that where questions of local law are involved and both Courts of Porto Rico have agreed, that their determination will not be reviewed unless the Court was convinced that clear error had been made,

Plazuela Sugar Company v. *Pastoriza*, 245 Fed., 115 (C. C. A. 1st);
Conron v. *Cauchois*, 242 Fed., 909 (C. C. C. A. 2nd).

the facts here are wholly different from those opinions. It is apparent that no question of local law is involved, the Porto Rican Civil Code not forbidding parties to make any legal contract that they deem proper (Civil Code, Sec. 1223).

Moreover, the fact that the plaintiff on August 10, 1914, finally accepted the defendant's understanding of the contract in so far as he presented a check to the Bank to release the sugar, clearly showed that that was the real agreement. All the other circumstances also show that the District Judge was right in his finding that the sugar was pledged and that the defendant did mention that fact, as he naturally would when making the agreement with the plaintiff for the sale of the sugar.

The testimony of Vals, the defendant's Treasurer, who stated that the defendant's President, Mr. Valdes, made this statement in the telephone conversation, the testimony of Mr. Hiltz, the Manager of the Bank and an unprejudiced witness, and that admission by the plaintiff on cross exam-

lination that in the conversation he asked Mr. Valdes whether the sugar belonged to the defendant *or to the Bank*, all show beyond a doubt that the agreement required the plaintiff to take up the sugar at the Bank before he could receive any delivery. The Supreme Court of Porto Rico did not have the benefit of having observed the manner of the plaintiff on cross examination as did the District Judge, or to observe with what frankness the other witnesses testified, and the decision of the Supreme Court of Porto Rico being so clearly erroneous in this respect, this Court, under all the authorities, should, upon this vital point, reverse the Supreme Court of Porto Rico and reinstate the findings of the District Court.

Should this be done, then clearly there was no breach of contract, for the plaintiff clearly first broke it by not depositing the money at the Bank as he was asked to do by both the officers of the defendant and Mr. Hiltz, the Manager of the Bank, who called him up on the telephone out of courtesy and told him that the money should be deposited with the Bank and also told him the same thing when the plaintiff came down to the Bank. If the plaintiff had the funds on deposit in the Bank as he stated and was a man of means, the condition of pre-payment could easily have been met by him, and the fact that the sugar was pledged, as is undisputed in this record, made the request to take it up at the bank most reasonable and was no possible reflection on the credit or standing of the plaintiff.

In this changing market, it was unreasonable to allow the plaintiff the option to deposit the money at the Bank during a long period of time when each day the sugar situation was so different. The Code of Commerce of Porto Rico contemplates a delivery and payment of price, in the absence of specific agreement to the contrary, as due within 24 hours after the transaction (Code of Commerce, Secs. 337, 339), so it was not necessary to state when the transaction was to be completed by the payment of the money

to the Bank. If the market, instead of steadily rising, had taken a drop during the week beginning August 10, 1914, and the price had gone down below the contract price, the plaintiff might never have gone to the Bank to take up the sugar, and to permit the plaintiff to wait indefinitely before deciding when to deposit the money in the Bank, made the contract wholly unilateral and unfair to defendant. The defendant did give the plaintiff three full banking days within which to pay the money, August 4th, 5th and 6th, 1914, and the plaintiff himself breached the contract by not making payment at the bank during this period. Defendant was fully justified in canceling the contract for this breach on the part of the plaintiff.

Civil Code, Porto Rico, Secs. 1067, 1091, 1369;
Graf v. *Cunningham*, 109 N. Y., 369;
City of New York v. *Third Nat. Bank*, 221 Fed., 175, 177 (C. C. A. 2nd); Cert. Denied, 238 U. S., 628.

Section 1067 of the Civil Code of Porto Rico provides:

"In mutual obligations none of the persons bound shall incur default if the other does not fulfill or does not submit to properly fulfill what is incumbent upon him."

In same section:

"Persons obliged to deliver or do something are in default from the moment when the creditor demands the fulfillment of their obligation, judicially or extra-judicially."

Section 1091 reads:

"The right to rescind the obligations is considered as implied in mutual ones, in case one of the obligated persons does not comply with what is incumbent upon him."

Finally, Section 1369 provides:

"The vendor shall not be bound to deliver the thing sold, if the vendee shall not have paid the

> price, or if a period for the payment has not been fixed in the contract."

The plaintiff having the burden of proving that the contract was as alleged in his complaint, upon any fair estimate of the evidence it is seen that the findings of the District Judge are correct and that the Supreme Court of Porto Rico must have been led to reverse these findings merely because it appeared that subsequent to August 4th, 1914, the price of sugar took a jump upwards, the reasoning being that the defendant must therefore have attempted to get out of the contract, which called for payment of a lesser price than what existed in the market when the deliveries were to be made. The burden of proving the contract was upon the plaintiff both as a matter of general law and under the Civil Code of Porto Rico. Section 1182 of the Civil Code provides:

> "Proof of obligations devolves upon the person claiming their fulfillment and that of their extinction upon those opposing it."

The Supreme Court of Porto Rico having made no finding that the contract was not as stated in Exhibit C, and as testified to by the defendant, the plaintiff failed in its burden and the judgment rendered by the District Court should be reinstated.

POINT II.

If the defendant's offer to sell the sugar providing the pledge to the Royal Bank of Canada was satisfied by paying the purchase price direct to the bank was not accepted, no valid contract existed.

The plaintiff's proof shows not only that the sugar was pledged, but that immediately after the telephone conversation the defendant wrote a confirmatory letter (Exhibit C, Rec., p. 19), that the money must be paid to the Royal Bank of Canada before any deliveries could be made. Unless this Court is prepared to hold that this confirmatory letter was an attempt to deceive the plaintiff and that the defendant never intended to make any sale whatsoever, it clearly must be considered as evidencing the defendant's ideas of the contract and to be the defendant's offer of sale of the sugar. That the plaintiff did not accept the defendant's offer, appears from the letter (Exhibit E), in which he says:

> "I agree with all except with the duty which you impose on me of paying for the article before receiving same" (Exhibit E, Rec., p. 20).

This refusal on the part of the plaintiff to accept the important condition of the defendant's offer of sale amounted in law to a rejection of the offer for it is well settled that an offer to constitute a binding contract must be accepted in the terms in which it is made. Any alteration in such terms or the raising of new ones, amounts to a rejection of the offer and there is no binding contract.

National Bank v. *Hall*, 101 U. S., 43;
Carr v. *Duval*, 14 Peters, 77;

Minneapolis, &c., R. R. v. *Columbus Rolling Mill*, 119 U. S., 149;
Beaumont v. *Prieto*, 249 U. S., 534;
Travis v. *Nederland Life Ins. Co.*, 104 Fed., 486;
Doyle v. *Hamilton Fish Corporation*, 234 Fed., 47, 50 (C. C. A., 2nd);
Groschke v. *Armour Fertilizer Works*, 245 Fed., 513 (C. C. A., 3rd);
Pool v. *Brunswick-Balke-Collender Co.*, 216 N. Y., 310.

In *National Bank* v. *Hall*, 101 U. S., 43, Mr. Justice SWAYNE, writing for this Court, said at page 49:

> "The minds of the parties, as shown by these letters, moved on parallel, not on concentric lines. There was not the meeting of minds and the mutuality of assent to the same thing, which are necessary to create a contract. * * *
>
> Where there is a misunderstanding as to the terms of a contract, neither party is liable in law or equity."

At page 50, said:

> "A proposal to accept, or acceptance upon terms varying from those offered, is a rejection of the offer."

In *Minneapolis, &c., Ry.* v. *Columbus Rolling Mill*, 119 U. S., 149, the defendant Rolling Mill wrote to the plaintiff offering to sell to the plaintiff 2,000 to 5,000 tons iron rails at $54 per gross ton, spot cash, the offer to expire on or before December 20th, 1879. Instead of accepting the offer, the Railroad Company on December 16th, by telegram and letter ordered 1,200 tons at the same price. On December 18th, the defendant Rolling Mill declined to fill the 1,200 ton order of the Railroad Company at that price, after which the Railroad Company ordered 2,000 tons, which the defendant refused to

611. It was held by this Court that the letter and telegram of the Railway Company of December 16th, being but a qualified acceptance of the Rolling Mill's offer, was in fact a rejection of it, Mr. Justice GRAY in writing for this Court, saying at page 151:

> "The rules of law which govern this case are well settled. As no contract is complete without the mutual assent of the parties, an offer to sell imposes no obligation until it is accepted according to its terms. So long as the offer has been neither accepted nor rejected, the negotiation remains open, and imposes no obligation upon either party; the one may decline to accept, or the other way withdraw his offer; and either rejection or withdrawal leaves the matter as if no offer had ever been made. A proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modification suggested. The other party having once rejected the offer, cannot afterwards revive it by tendering an acceptance of it. *Eliason* v. *Henshaw*, 4 Wheat., 225; *Carr* v. *Duval*, 14 Pet., 77; *National Bank* v. *Hall*, 101 U. S., 43, 50; *Hyde* v. *Wrench*, 3 Beavan, 334; *Fox* v. *Turner*, 1 Bradwell, 153."

In *Beaumont* v. *Prieto*, 249 U. S., 554, which was an appeal from the Supreme Court of the Philippine Islands, there was an offer made on December 4th, 1911, to sell certain lands for the price of its assessed Government valuation [307,000 pesos], the option to last for three months. A month and a half later and on January 17th, 1912, a letter was written to Borck, the assignor of the plaintiff in error, offering to buy the property for 307,000 pesos, payable on May 1st, 1912. This was rejected and the land was never conveyed. In affirming the judgment, Mr. Justice HOLMES writing for this Court, said:

> "The letter of January 17, plainly departed from the terms of the offer as to the time of payment and

> was, as it was expressed to be, a counter offer. In the language of a similar English case, 'plaintiff made an offer of his own * * * and he thereby rejected the offer previously made by the defendant * * *. It was not afterwards competent for him to revive the proposal of the defendant, by tendering an acceptance of it.' *Hyde* v. *Wrench*, 3 Beavan, 334. Langdell, Cont., Sec. 18."

In *Peel* v. *Brunswick-Balke-Collender Co.*, 216 N. Y., 310, SEABURY, J., writing for the unanimous New York Court of Appeals, said at page 319:

> "When the plaintiffs submitted this offer in their letter of April 4th to the defendant, only one of two courses of action was open to the defendant. It could accept the offer made and thus manifest that assent which was essential to the creation of a contract or it could reject the offer. There was no middle course. If it did not accept the offer proposed, it necessarily rejected it. A proposal to accept the offer if modified or an acceptance subject to other terms and conditions was equivalent to an absolute rejection of the offer made by the plaintiffs." (Many New York cases cited).

Even if we assume that both the plaintiff and the defendant misunderstood each other during the telephone conversation of August 4th, 1914, and their respective letters of confirmation differing as to this important part of the contract, namely, the method of payment, represented respectively their honest different recollections of the conversation, then clearly there was no meeting of the minds and the plaintiff wholly failed in his burden of showing that the contract was as alleged by him in his complaint. If this be true, the Supreme Court of Porto Rico was not justified in awarding judgment for the plaintiff for any amount. In this connection it is important

to consider the second conclusion of law made by District Judge FOOTE, as follows:

> "II. That the proposal made in said letter to the defendant that the date of the delivery of the goods should be changed, constituted a proposal to modify the said contract, which was never accepted by the defendant" (Rec., p. 12).

Under the authorities cited, the late attempt made on the 10th of August (Exhibit K, Rec., p. 23), by the plaintiff to go to the Royal Bank of Canada and to pay the purchase price to the Bank to release its pledge and so obtain delivery of the sugar was wholly unavailing. The situation is very similar to that in the case of *Minneapolis, &c., R. R. v. Columbus Rolling Mill*, 119 U. S., 149, where it was held that the Railroad's attempt to order the 2,000 tons rails and to accept the original offer was invalid after they had once rejected the offer. No contract being in existence the offer was withdrawn and could not then be accepted.

In this case it is undisputed that on August 7th, 1914, following a refusal of the plaintiff to deposit the money with the Bank, the defendant's offer of August 4th, 1914, was withdrawn (Exhibit H, Rec., p. 22; see also Finding VIII, Rec., p. 11).

POINT III.

An improper measure of damages was adopted by the Supreme Court of Porto Rico.

Assuming, for the purpose of this discussion, that the defendant did breach the contract, the question then arises whether the Supreme Court of Porto Rico was not clearly in error in awarding to the plaintiff $6,173.24 (Rec., p.

93), based on the market price of the last day of delivery August 15, 1914, when the plaintiff had not paid one cent to defendant in this transaction and the entire price for the 188,496 pounds of sugar was only $6,079 (Rec., p. 19). In determining the measure of damages, it is important to remember that here there was no definite time for delivery of the sugar, but it was agreed:

> (1) that the 160 sacks of 252 pounds each, or 40,320 pounds in all, should be delivered during the week of August 4, 1914, while
>
> (2) the remainder of the sacks, 588, were to be delivered by the defendant at the convenience of the defendant, in the defendant's own ox-carts, and transported from the Central over 8 kilometers of road to the plaintiff's store at the Playa at Mayaguez at any time during the week beginning August 10th and ending August 15th, 1914.

This being, therefore, a contract involving delivery by instalments, the decisions are unanimous that the proper measure of damages must be determined by ascertaining the market price, when each of the instalment deliveries was due. Under this rule, in no event could the price of the 160 sacks deliverable during the first week exceed the market price of the sugar on Saturday, August 7th, which was $4.26 (Rec., p. 37), less the 20 cents deducted for payment in Porto Rico (Rec., p. 36), making the net price $4.06. The difference in price then for these 160 sacks, or 40,320 pounds, would be the difference between $3.22½ and $4.016, or $.83½ a hundred-weight, $336.67, and not the difference between $6.52 and $3.22½—$3.29½ or $1,338.54, taken by the Supreme Court of Porto Rico. It follows that on these bags alone that Court erred in giving $1,338.54 instead of $336.67 and that at least a reduction of $1,001.87 from the damages should be made.

The authorities as to instalment deliveries include the following:

Roller v. *Leonard,* 229 Federal, 607; (C. C. A., 4th);
Sizer v. *Melton & Son,* 129 Georgia, 143;
Brown v. *Miller, L. R.,* 7, Exch., 319;
Joslin v. *Irvine,* 6 H. & N., 512;
O'Gara v. *Ellsworth,* 85 App. Div., 216, 220;
New York & Philadelphia Coal & Coke Co. v. *Meyersdale Coal Company,* 236 Fed., 536 (C. C. A., 3rd);
Shreve v. *Brereton,* 51 Penn., 175, 185;
Sogola Lumber Company v. *Chicago Title & T. Co.,* 121 Ill. App., 292, 298;
Johnson & Thornton v. *Allen & Jemenson,* 78 Ala., 387;
Hebron Mfg. v. *Powell Knitting Co.,* 171 Fed., 817 (C. C. A., 3rd);
Youghiogheny & O. Coal Co. v. *Verstine, Hibbard & Co.,* 176 Fed., 972;
Thedford v. *Herbert,* 135 App. Div. (N. Y.), 174;
Williston on Sales, Sec. 991.

In *Roller* v. *Leonard,* 229 Fed., 607, instalment deliveries were provided for, and the Court said:

> "We are of the opinion that the contract did not authorize plaintiffs to arbitrarily, or otherwise than in their regular and usual course of business, and the capacity of defendant's mill properly operated, call upon defendant to ship extract in quantities, or at periods of time, not within the contemplation of the parties, as expressed in the written contract and conditions under which it was executed. While defendant, by failing to make the weekly reports, relieved plaintiffs of the duty of basing orders on such reports, and by notifying plaintiffs that he

would not ship any extract relieved them of the duty of sending orders, and by these breaches of his contract subjected him to an action for damages, they did not entitle plaintiff to demand of him that which he never promised or contracted to do, or to create arbitrarily conditions which were not contemplated by either party at the time the contract was entered into. The principle upon which the rights of plaintiffs and liability of defendant is fixed is stated by Mr. Sedgewick:

> 'When a contract is performable in instalments, such, for instance, as a contract to manufacture and deliver goods in stated amounts from time to time, and there is a repudiation during the period of performance, the damages for a breach consisting in the non-performance of subsequent instalments is to be estimated as at the time of performance of each (instalment), and not as at the time of the performance of the last instalment. If, for instance, between the time of the first breach, the value of the goods to be delivered fluctuates, the buyer who has failed to receive the instalment due him cannot demand damages, based on the value of the goods at the time the last instalment should have been delivered, but he must be content with a basis of compensation which will give him the value of each instalment at the time it should have been delivered.' 2 Dam., Sec., 636-b.

"The principle upon which damages are to be assessed in such cases is illustrated in *Brown* v. *Miller, L. R.* 7, Ex., 319. Defendant contracted to sell and deliver to plaintiff a large quantity of iron to be delivered in about equal portions—September, October and November, 1871. During the month of August defendant notified plaintiff that he did not intend to deliver any iron. Plaintiff, after the expiration of the time for the last delivery had passed, sued defendant for damages for breach of their contract. KELLY, *C. B.*, said:

> 'Now the proper measure of damages is that sum which the purchaser requires to put himself

> in the same condition as if the contract had been performed. The plaintiff might, if he had so elected, have treated the contract as at end, when the defendant announced his intention to break it. But that is a matter of election on plaintiff's part, and even although he had elected then to treat the contract as broken, yet in considering the question of damages, they would still be estimated with reference to the time at which the contract ought to have been performed; that is, in this case, at the ends of the months of September, October and November.'

"In *Joslin* v. *Irvine*, 6 H. & N., 512, 30 L. J., Ex. 78, defendant contracted to deliver naphtha in weekly parcels. He failed to perform his contract. WILDE, *J.*, said:

> 'I want to know the market price at the end of the first, second and third weeks, when the naphtha was to have been delivered. The damages must be assessed with reference to the market price on each of the days fixed for the delivery of the naphtha.'"

In *New York & Philadelphia Coal & Coke Co.* v. *Meyersdale Coal Co.*, 236 Fed., 536 (C. C. A., 3rd, 1916), the Court quoting the following sentence from the correspondence, said (p. 538):

> "'You understand that we wish the monthly shipment spread over each month, and by that we mean not to ship any large amount on one day and then not ship any more for a long time.'
>
> "(2) The bearing of this sentence upon the measure of damages is obvious. If it is not part of the contract, the parties agreed upon the delivery of 2,500 tons 'monthly,' and such an obligation would be fulfilled by delivery on the last day of the month. As no coal was ever delivered, the measure of damages would be the difference between the contract price and the market price at the end of each month. Since, however, the latter justifies the

conclusion that the parties intended, and contracted with sufficient clearness, that deliveries should be spread over each month, the best measure available for a complete failure to deliver would be the average price during the month."

In *O'Gara* v. *Ellsworth*, 85 App. Div., 216, 220, HOUGHTON, *J.*, said, page 220:

"The damages of the plaintiff depended upon the market price at which he could have purchased the coal at the time and place of delivery. (*Dana* v. *Fiedler*, 12 N. Y., 40). If coal could not be obtained from the Crescent mine, evidence of the price of similar coal at places not distant, or in other controlling markets, would be proper, not for the purpose of establishing the market price at another price, but for the purpose of showing the market price at the place of delivery. (*Cahen* v. *Platt*, 69 N. Y., 348.) Besides, the prices given by the witnesses, at Joliet and Chicago, were retail prices. Market value is the price at which goods can be replaced for money in the market; not the retail price for which they are sold. (*Wehle* v. *Haviland*, 69 N. Y., 448.) The highest market price in the season of 1899 was not the fair measure of damages, even if it had been proper to prove the price of coal at Joliet and Chicago. Where property should have been delivered at any time within a certain period, the law, in regulating the measure of damages, contemplates a range of the entire market and the average of prices as thus found, running through the period of time. Neither a sudden and transient inflation nor depression of prices should control the question."

In the present case we have the time of delivery within the control of the defendant, who might have delivered the sugar in the ox-carts at any time during the week beginning August 10, 1914, and doubtless the sugar would have been loaded on the ox carts each day of that week. If these had all been delivered on the 10th, the price of the sugar,

which was $4.97 less 20 cents, or $4.77, made the difference between the contract price and the market price on that day, but $1.345 each hundred pounds, or $2,555.27 for the entire 188,496 pounds and not $6,173.24 which would require a deduction of $3,617.97 from the judgment. If the average price of the week be taken a large reduction also would result.

The authorities also state that where goods are deliverable within a certain period at the seller's option, the market price on the day when the seller gave plaintiff notice of his intention not to deliver is to be taken in computing the damages.

> 35 Cyc., 638;
> *Woerman* v. *McKinney-Quedry Co.*, 174 Kent, 521.

Cyc., states the rules as follows:

> "but if the goods were deliverable within a certain period at the seller's option, the market price on the day when he gave plaintiff notice of his intention not to deliver is to be taken in computing the damage, that day being the time of default" (35 Cyc., 638).

In the *Woerman* v. *McKinney-Quedry Co.* case, it is stated:

> "All the authorities are to the effect that the time at which the market or true value of the goods must be ascertained in estimating the damages for a failure to deliver personal property is the time fixed in the contract for the delivery. If the articles may be delivered under the contract within a designated period at the option of the seller, when he shall give notice of his intention not to deliver them, this will be considered as the time of the breach of the contract, but if the article is to be delivered within a certain period, at the option of the purchaser, although the seller gives notice of his intention not to make the delivery, the market price or value of

> the article will not be computed as of the date of the notice, but as the time when the delivery should have been made. 35 Cyc., 637."

Adopting this rule, and assuming that the contract was breached by the defendant, the damages would be determined as of the 7th of August, 1914, when the plaintiff received word that the defendant would not deliver the sugar, and the price then was but $4.26 a hundred pounds, and with the 20 cent Porto Rico deduction $4.06, a difference of $.83½ from the contract price, and even assuming that the entire 188,496 pounds were to be included in this arrangement, the plaintiff's damages would have been $1,573.96, and not $6,173.24, and a reduction of $4,599.28 from the judgment would result.

The Uniform Sales Act which is in effect in Massachusetts, Section 67, and in New York (Personal Property Law, Section 148) and which is derived from the English Sales Act and is, in this respect, declaratory of the common law, has the following provision:

> "3. When there is an available market for the goods in question, the measure of damages in the absence of special circumstances showing approximate damages of a greater amount is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered or if no time was fixed then at the time of the refusal to deliver."

Should this rule be used, then clearly no definite times having been fixed for delivery, the market value on August 7th, 1914, when plaintiff received word that the defendant refused to deliver, should be taken. If, on the contrary, this Court should hold that a definite time was fixed, but that the defendant had the option to deliver the sugar partly during the week of August 4th, and the rest during the week beginning August 10th and ending August 15th, then the average price during the entire period when these

instalment deliveries could have been made should be taken, as the authorities already quoted indicate that this is the just rule.

In no event is it just to take the highest price during the entire period, which existed on the last day of which delivery could have been made, and hold the plaintiff responsible for the difference between the contract price and this extreme high price. Upon this measure of damages, plaintiff is relieved of the burden of making any attempt whatever to reduce his damages by making other purchases, and it has always been held, even on an admitted breach of contract, that the plaintff is not justified in running up the damages, but must use reasonable means to reduce them.

Wade McHenry Lumber Co. v. *Frank Spangler Co.*, 230 Fed., 418 (C. C. A., 5th);
Warren v. *Stoddart*, 105 U. S., 224.

The Supreme Court of Porto Rico evidently realized that its theory of damages was unjustly harsh when it stated that defendant might be held on the theory of a resulting trust because the defendant itself sold some of the sugar for $6.52. The action was not brought to impress any trust, but was a pure action at law for damages for breach of contract, and the principles applicable are those common to the law of sales throughout the commercial world. It is wholly immaterial for purposes of this action what the defendant got for this sugar, for if it broke its contract and the market had dropped and it had gotten only 3 cents a pound for its sugar, this would have been absolutely no defense to the action if the proper measure of damages at the time the contract was broken by it was a much larger sum. Similarly, the fact that it got a high price for its sugar cannot affect the measure of damages. The present case, with the damages thus far

higher than the entire contract price for the 748 sacks of sugar, shocks the judicial conscience. A reversal of this unjust judgment upon this point, therefore, must follow even if it be conceded that the contract was made as alleged by the plaintiff.

Conclusion.

This brief has been written upon the assumption that this Court in granting the writ of certiorari (248 U. S. 555) has determined that the technical rules of procedure applied by the United States Circuit Court of Appeals for the First Circuit should not prevent the merits of this case from being reviewed. In applying for the writ of certiorari your petitioner referred this Court to Chapter 22, Act of January 28, 1915, amending Section 246 of the Judicial Code of the United States providing for appeals and writs of error from the Supreme Court of Porto Rico and permitting this Court to require by certiorari

> "that the case be certified to it after final judgment or decree with the same power and authority as if taken to that court by appeal or writ of error."

The Judicial Code has abolished the former procedure which under the Act of April 7, 1874, Chapter 80, Section 2, required a statement "of the facts of the case in the nature of a special verdict." Under the Act of Congress of September 6, 1916, Chapter 448, Section 4, Federal Courts are authorized to disregard any errors in practice that do not affect the merits of the case and this Court, in *Friedcricksen* v. *Renard* (247 U. S. 207, 213) stated that substance should never be subordinated to forms of procedure.

That exceptions need not be taken to the action of an intermediate Appellate Court, was urged by your petitioner in applying to this Court for the writ of certiorari. It urged that there was no statute of Porto Rico requiring

exceptions to be taken to decisions of the Supreme Court of Porto Rico, and that the action of the United States Circuit Court of Appeals in this case, if approved, will revolutionize the entire practice prevalent in Porto Rico.

Upon the general proposition that exceptions to the action of an Appellate Court need not be taken, the following authorities were cited:

Shawnee Compress Co. v. *Anderson*, 209 U. S., 423.

Corpus Juris, Vol. 3, p. 951, Sec. 839.

Andrews v. *Cohen*, 221 N. Y., 548.

It has never been deemed necessary on an appeal from the Circuit Court of Appeals reviewing a lower Federal Court, District or Circuit, that there should be any bill of exceptions as to the rulings of the Appellate Federal Court — the Circuit Court of Appeals. So long as the plaintiff-in-error comes to this court with assignments of error, the record as considered by the Circuit Court of Appeals is reviewed by this Court, which puts itself in the place of the Circuit Court of Appeals and determines whether or not that court was correct in making its decision upon the law and upon the other questions presented to that court. In *Shawnee Compress Co.* v. *Anderson* (209 U. S., 423) where the Supreme Court of the Territory of Oklahoma had reversed the lower court, this court said:

> "In passing on the second proposition the Supreme Court decided adversely to the view taken by the trial court. The court, therefore, must either have considered that there was not some evidence supporting the conclusions of fact of the trial court or must have deemed the principles of law which the trial court upheld were not sustained by its conclusions of fact. As our review, in the nature of things, is confined to determining whether the court below erred, it follows that our reviewing power under the circumstances is coincident with

the authority to review possessed by the court below, and therefore we are confined, as was the court below, to determining whether there was some evidence supporting the findings and whether the facts found were adequate to sustain the legal conclusions. *Southern Pine Lumber Co.* v. *Ward*, 208 U. S., 126."

In Corpus Juris, article on appeal and error (Vol. 3, p. 951, Sec. 839), it is stated:

> Sec. 839. k. Review of Decisions of Intermediate Courts. Proper exceptions are generally necessary, as in other cases, on appeals or writs of error from or to intermediate appellate courts, where there has been a trial *de novo*. It is otherwise where the intermediate court merely reviews the record brought up from the inferior court, since, if the intermediate court has erred in its judgment, the error will appear by *the record of that court without any bill of exceptions*. But the reviewing court will not, on appeal from the intermediate court, review rulings in the original court to which no exceptions were saved in that court.

In *Andrews* v. *Cohen* (221 N. Y. 148), Andrews, *J.* said at pages 152-153:

> "Where the Appellate Division reverses or modifies a judgment of the Trial Term and orders a judgment proceeding on a different theory of the facts, it must make such additional findings as are necessary to support the judgment which it has ordered. *No exception need be taken to the findings. They are to be reviewed by us.*"

The Bar of Porto Rico would doubtless appreciate a statement from this Court upon the question of procedure involved in this case for its future guidance.

The judgment of the Circuit Court of Appeals affirming the judgment of the Supreme Court of Porto Rico should be reversed and the judgment of the District Court dismissing the complaint affirmed, with costs to the petitioner in all courts.

December, 1919.

Respectfully submitted,

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Supreme Court of the United States,

OCTOBER TERM, 1920.

No. 54.

ANA MARIA SUGAR CO.,
Petitioner,

AGAINST

TOMAS QUIÑONES,
Respondent.

BRIEF FOR RESPONDENT.

I.

1. The appeal to the Supreme Court from the Court "a quo" was supported by a bill of exceptions (R. 75).

2. The Supreme Court of Porto Rico is not a *purely Appellate Court,* but an intermediate Court, it may review questions of fact, make new findings and reverse the judgment of the District Courts on such questions of fact (Compilation of Revised Statutes and Codes of Porto Rico, p. 241-S. 1141 and Sect. 306, also see Opinion Circuit Court of Appeals, R. 140).

The true Appellate Court is the Circuit Court of Appeals for the First Circuit.

3. No special form is required for the Supreme Court of Porto Rico to make findings of fact. They may be made, as in the case at bar, in a general way. Rosaly *vs.* Graham, 227 U. S. 584, at 590-591.

4. **There being no bill of exceptions, the Circuit Court could not review errors of law during the trial.** Walton *vs.* U. S. and other authorities cited in Opinion of Circuit Court (R. 139).

5. Under the authorities, the writ of *Certiorari* must be vacated.

II.

1. The writ cannot take the place of an appeal from the Circuit Court, and open for review all questions of law and fact, which is the purpose sought by petitioner.

2. The Supreme Court cannot on *Certiorari* assume the position of a trial Court. Petitioner is asking this Court of last resort, to do, what it claims the Supreme Court, a Court of intermediate jurisdiction, had no authority to do, namely, to review the whole case on questions of evidence.

III.

1. No findings of fact in the form of a special verdict are now required in Porto Rico.
   Porto Rico *vs.* Emanueli, 235 U. S. 251-255.

2. The Circuit Court of Appeals in considering the appeal as a writ of error, applied the provisions of chapter 448, Laws of Congress of September 6, 1916.

3. At page 119 (R. 89-90) the Supreme Court of Porto Rico explains why detailed findings are unnecessary and useless, but makes a *specific finding* as to the gist of defendant's case, namely *"that in the conversation by telephone, on the 4th of August, which constituted the true contract between the parties, nothing whatever was said about a deposit of money as a condition precedent to the delivery of the sugar."*

If the only purpose in making specific findings of fact is to permit appellant to incorporate in its assignment of errors and bill of exceptions the specific grounds for the appeal, this purpose was fully served by the finding above quoted. Nothing can be more definite or specific. *No exception to this finding was however taken or assigned by appellant, in the Circuit Court.*

4. *No assignment of error or exception was taken to the action of the Supreme Court of Porto Rico in assuming the review of questions of fact and reversing the lower Judgment, or to its failure to make specific findings* (see R. 95-96)—Error VI of appellant (R. 95)—only attacks power of the Court to review the evidence and reverse judgment *"upon the condition precedent for the payment of said sugar,"* but not as to the power of the Court *in general* to review questions of fact, which objection was waived, by failure to take specific exception thereto.

Appellant cannot be heard, for the first time in these proceedings, to contest the authority of the intermediate Court, which it had already impliedly admitted.

IV.

1. It is elementary that an Appellate Court may review the evidence, even if contradictory, when the trial Court acted arbitrarily or with manifest prejudice towards one of the parties. Such was the case with the trial Court. See Transcript of record of District Court. Pp. 1-75 Record on Writ of *Certiorari*.

Writ should be vacated and Petition dismissed.

Respectfully submitted,

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Attorney for Respondent.